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NOT TO BE PUBLISHED IN OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIRST APPELLATE DISTRICT

DIVISION FOUR

THE PEOPLE, Plaintiff and Respondent, v. MARSHALL TIMOTHY RUDOLPH Defendant and Appellant.	A127267 (Solano County Super. Ct. No. FCR268038)

I.

INTRODUCTION

Appellant Marshall Timothy Rudolph contends that the trial court violated his federal constitutional right to due process when it imposed vague and overbroad probation conditions, including prohibiting him from being in the presence of minors and ordering him to submit to polygraph examinations. We conclude that the probation condition regarding appellant being in the presence of minors is overly broad and must be narrowed in order to avoid constitutional infirmity. Otherwise, we find no merit in appellant's arguments. Accordingly, we direct the trial court to correct the minute order and modify the challenged probation conditions, and affirm the judgment (order granting probation) as modified.

II.

FACTS AND PROCEDURAL HISTORY

On the evening of Halloween 2008, victim S.G., age 15, went trick-or-treating with her sister and her sister's friend. They later met up with appellant, age 18. When

S.G.'s sister and her sister's friend left, S.G. and appellant continued trick-or-treating. Appellant then took S.G. up a steep street called "Death Hill." At some point, appellant began kissing her in a dark area between two buildings. S.G. and appellant were standing when appellant removed S.G.'s underwear from underneath her Halloween costume and inserted his penis into her vagina. S.G. made statements suggesting she did not want to have sexual intercourse; however, it was unclear whether appellant was directed to stop. On July 2, 2009, an arrest warrant was issued, and appellant was later arrested on that warrant on August 30, 2009.

On September 14, 2009, appellant withdrew his not guilty plea and pled no contest to violation of Penal Code[1] section 261.5, subdivision (c), unlawful sexual intercourse with a minor, not the spouse of defendant, the minor being more than three years younger than the defendant. On January 4, 2010, appellant was sentenced to 90 days in county jail and three years of probation, including counseling and therapy. Over his written objection, the court imposed certain "sex offender terms" recommended by the probation department, with some modifications. Appellant agreed to the terms of probation[2] but nonetheless filed a timely notice of appeal contesting their constitutionality.

III.

DISCUSSION

Section 1203.1, subdivision (j) gives a trial court the authority to impose reasonable conditions of probation "as it may determine are fitting and proper to the end that justice may be done, that amends may be made to society for the breach of the law, for any injury done to any person resulting from that breach, and generally and specifically for the reformation and rehabilitation of the probationer . . . ." "Trial courts have broad discretion to set conditions of probation in order to 'foster rehabilitation and

[1] Unless otherwise indicated, all statutory references are to the Penal Code.

[2] Appellant's ultimate acceptance of the conditions of probation does not preclude him from challenging them on appeal: " '[I]t is established that if a defendant accepts probation, he may seek relief from the restraint of an allegedly invalid condition of probation on appeal from the order granting probation.' " (*People v. Penoli* (1996) 46 Cal.App.4th 298, 302, fn. 2.)

to protect public safety pursuant to . . . section 1203.1.'. . ." (*People v. Lopez* (1998) 66 Cal.App.4th 615, 624, quoting *People v. Carbajal* (1995) 10 Cal.4th 1114, 1120.) If a probation condition serves to rehabilitate and protect public safety, the condition may "impinge upon a constitutional right otherwise enjoyed by the probationer, who is 'not entitled to the same degree of constitutional protection as other citizens.' [Citation.]" (*People v. Lopez*, at p. 624.)

The court's discretion, however, is not unlimited. A probation condition is unreasonable if it "(1) has no relationship to the crime of which the offender was convicted, (2) relates to conduct which is not in itself criminal, and (3) requires or forbids conduct which is not reasonably related to future criminality[.]" (*People v. Dominguez* (1967) 256 Cal.App.2d 623, 627.) But, " 'a condition of probation which requires or forbids conduct which is not itself criminal is valid if that conduct is reasonably related to the crime of which the defendant was convicted or to future criminality.' [Citation.]" (*People v. Phillips* (1985) 168 Cal.App.3d 642, 646.) " 'As with any exercise of discretion, the sentencing court violates this standard when its determination is arbitrary or capricious or " 'exceeds the bounds of reason, all of the circumstances being considered.' " ' [Citation.]" (*People v. Garcia* (1993) 19 Cal.App.4th 97, 101.)

Judicial discretion to set conditions of probation is further circumscribed by constitutional considerations. (*People v. Hackler* (1993) 13 Cal.App.4th 1049, 1058.) "The *Dominguez/Lent*[3] test of the validity of a condition of probation may be supplemented by a second level of scrutiny: where an otherwise valid condition of probation impinges on constitutional rights, such conditions must be carefully tailored, ' "reasonably related to the compelling state interest in reformation and rehabilitation . . . ." ' [Citations.]" (*People v. Bauer* (1989) 211 Cal.App.3d 937, 942.)

Appellant argues that the probation terms violate his due process rights due to the terms' vagueness and overbreadth. Appellant objects to the following probation terms: (1) Appellant may "[n]ot be in the presence of, or attempt to contact by any method, any

[3] *People v. Lent* (1975) 15 Cal.3d 481.

person under the age of 18 without approval in advance, and in writing, by the probation officer after consultation with the therapist. (*This includes going to or loitering near areas frequented by children including, but not limited to, parks, playgrounds, and arcades.*) . . . [with] the exception of his [two] siblings"; (2) Appellant may "[n]ot be in the presence of any person under the age of 18 without a responsible adult present as approved by the probation officer [i]n writing ([with] the exception of his [two] siblings)"; and (3) Appellant must "[s]ubmit to any program of psychological assessment at the direction of the therapist including, but not limited to, the polygraph to assist in treatment, planning and case monitoring." (Original italics; bolding and underscoring omitted.)

A. Associating with Minors

"The right to associate . . . 'may be restricted if reasonably necessary to accomplish the essential needs of the state and public order.' [Citations.] Such restrictions are ' "part of the nature of the criminal process. [Citation.]" ' [Citation.] A limitation on the right to associate which takes the form of a probation condition is permissible if it is '(1) primarily designed to meet the ends of rehabilitation and protection of the public and (2) reasonably related to such ends.' [Citations.]" (*People v. Lopez, supra*, 66 Cal.App.4th at pp. 627-628.) In *People v. Delvalle* (1994) 26 Cal.App.4th 869, 878, the reviewing court upheld a probation condition that the defendant, who was convicted of attempting to buy a four-year-old child, " 'stay away from any places where minor children congregate.' " In *People v. Mills* (1978) 81 Cal.App.3d 171, 181-182, the defendant had physically restrained a seven-year-old girl, molested her, and attempted to have intercourse. The reviewing court approved a probation condition that defendant not associate with girls under 18 years of age except in the company of responsible adults.

Because probation conditions foster rehabilitation and protect the public safety, they may infringe upon the constitutional rights of the defendant, who is "not entitled to the same degree of constitutional protection as other citizens." (*People v. Peck* (1996) 52 Cal.App.4th 351, 362.) Consequently, restrictions on a probationer's right of association

are permissible if reasonably required to accomplish the needs of the state. (*People v. Robinson* (1988) 199 Cal.App.3d 816, 818 ["restriction of the right of association is part of the nature of the criminal process"].)

Thus, a properly drawn condition prohibiting association with minors is entirely reasonable, as in this case. Appellant pled no contest to one count of unlawful sexual intercourse with a female minor. Probation conditions limiting his access to female minors unquestionably relates to the offense appellant committed and are designed to prevent future criminal acts. Appellant, however, argues that the probation terms which include contact with minor males and preadolescent females are excessively broad as there is no indication that appellant poses any danger to either of these groups of minors.

We agree only in part. Here, limiting the appellant's ability to associate with minor females reasonably accomplishes the needs of the state in limiting appellant's access to females in the age cohort involved in his sexual misconduct. We also see no impropriety in extending the age of prohibited female contacts to both preadolescent and postadolescent minor females. It was reasonable for the trial court to conclude implicitly that all minor females were at risk in the event of unsupervised contacts with appellant.

However, no reason was cited by the trial court justifying the extension of the association prohibition to males under the age of 18 years old, and we can think of none meeting the facts of this case. A male was not the target of the admitted offense. This was appellant's first criminal offense, and the probation report confirmed that appellant had "residential stability and employable skills." There was no indication that substance abuse contributed to the offense.

Probation conditions must be narrowly tailored and sufficiently precise to avoid unconstitutional overbreadth and vagueness. The "void for vagueness" doctrine applies to conditions of probation and is concerned with constitutionally adequate notice. (*People v. Lopez, supra*, 66 Cal.App.4th at p. 630; *People v. Reinertson* (1986) 178 Cal.App.3d 320, 324-325.) Under the doctrine, a probation condition "must be sufficiently precise for the probationer to know what is required of him, and for the court to determine whether the condition has been violated. [Citation.]" (*People v. Reinertson,*

at pp. 324-325; accord, *People v. Lopez*, at p. 630; see also, e.g., *Tobe v. City of Santa Ana* (1995) 9 Cal.4th 1069, 1106-1107 [ordinance].)

In the case at hand, two of the probation terms are constitutionally overbroad. Prohibiting appellant from being "in the presence of . . . any person under the age of 18," as two of the probation terms require, restricts benign contact with persons such as grocery clerks, sales personnel, and others. Many perfectly legal activities unrelated to future criminality are covered by this probation condition. As such, the condition as written is overbroad. In addition, prohibiting association with minor males is unrelated to the offense, the potential for future criminality, or the interests of the state in public protection, and constitutes an overbroad, unconstitutional infringement on appellant's rights. " '[T]o the extent [that a condition of probation] is overbroad it is *not* reasonably related to the compelling state interest in reformation and rehabilitation and is an unconstitutional restriction on the exercise of fundamental constitutional rights.' [Citations.]" (*In re White* (1979) 97 Cal.App.3d 141, 146, original italics.)

We believe an appropriate constitutional balance requires a modification of the challenged conditions to clarify that appellant is not to *associate* with any female person under the age of 18 absent prior approval of the probation officer, with the exception of his two siblings.

Accordingly, the two challenged conditions are to be modified as follows: (1) "Defendant shall not associate with any female person under the age of 18 without approval in advance, and in writing, from his probation officer after consultation with the therapist with the exception of his two siblings." Paragraph (2), prohibiting appellant from "associat[ing] with any person under the age of 18 without a responsible adult present as approved by the probation officer in writing, with the exception of his two siblings," is hereby ordered to be stricken.

B. Submission to Polygraph Examinations

Appellant also contends the polygraph condition is overbroad. In support of his argument, appellant attempts to analogize this case to *Brown v. Superior Court* (2002) 101 Cal.App.4th 313. In *Brown*, the trial court imposed a condition requiring periodic

polygraph examinations at the direction of the probation officer after the defendant was convicted of stalking. (*Id*. at p. 321.) The condition was found to be impermissibly overbroad because there were no restrictions on the questions that could be asked by the examiner, and the court did not otherwise tailor the condition to comport with the court's purpose in imposing the condition. (*Ibid*.) The appellate court limited the defendant's polygraph probation condition to questions relating to successful completion of a court-mandated stalking program, and to the crime for which he was convicted. (*Id*. at pp. 322-323.) "[P]eriodic polygraph examinations in furtherance of [defendant's] stalking therapy program is a valid condition of probation," the appellate court held, "because it is reasonably related to the crime of which [defendant] was convicted and to possible future criminality. [Citations.]" (*Id*. at p. 321, italics omitted.)

In *People v. Miller* (1989) 208 Cal.App.3d 1311, the defendant was convicted of committing a lewd and lascivious act upon a minor and was placed on probation with the condition that he have no private contact with minor females, and that he submit to a polygraph examination at the direction of his probation officer. In rejecting numerous arguments as to why the polygraph condition was unreasonable, the reviewing court pointed out that compliance with the condition that the defendant not be alone with young girls is difficult to enforce, and "[t]he polygraph condition helps to monitor compliance and is therefore reasonably related to the defendant's criminal offense. Because this condition is aimed at deterring and discovering criminal conduct most likely to occur during unsupervised contact with young females, the condition is reasonably related to future criminality. [Citations.]" (*Id*. at p. 1314.)

In response to the related contention that the polygraph condition also was overbroad because no restrictions were placed on the questions the examiner could ask, the appellate court stated: "This is patently incorrect. The polygraph condition was expressly requested by the probation officer and imposed by the court to monitor defendant's compliance with the condition prohibiting unsupervised contact with young females. Thus any polygraph examination administered to defendant necessarily will be

limited to questions relevant to compliance with that condition." (*People v. Miller*, *supra*, 208 Cal.App.3d at p. 1315.)

Here, the trial court stated the purpose of authorizing the use of the polygraph examinations was to "determine [appellant]'s compliance and progress in treatment and the planning of his treatment in his case monitoring." The court's oral order makes no mention of any questioning besides those related to his crime, or the treatment for it. In conclusion, we disagree with appellant that the failure to make this limitation even more explicit provides any justification for striking the condition.

IV.

DISPOSITION

The probation condition prohibiting appellant from being in the presence of any person under the age of 18 years is ordered to be modified as follows: "(1) Defendant shall not associate with any female person under the age of 18 without approval in advance, and in writing, from his probation officer after consultation with the therapist, with the exception of his two siblings." Paragraph (2), which prohibits appellant's association "with any person under the age of 18 without a responsible adult present as approved by the probation officer in writing, with the exception of his two siblings," is hereby ordered to be stricken.

As modified, the judgment is affirmed. Upon remand, the trial court shall correct its records.

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RUVOLO, P. J.

We concur:

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SEPULVEDA, J.

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RIVERA, J.